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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 316.

THE MAY DEPARTMENT STORES COMPANY, a Corporation,
Doing Business as FAMOUS-BARR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MILTON H. TUCKER,
ROBERT T. BURCH,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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I.

A Different Standard of Judicial Review Was Imposed by the Administrative Procedure Act.

The Brief in Opposition, filed for the Board, argues that no different standard of judicial review was imposed by the **Administrative Procedure Act** and the **Labor Management Relations Act, 1947** (Br. 12, 13). This argument of the Board ignores the language of these new acts. For the

purpose of this case the **Administrative Procedure Act** which has been in effect during all the time that this case was pending in the court below is controlling. The similar provisions of the **Labor Management Relations Act, 1947**, enacted June 23, 1947, only add to the general importance of the question presented.

Section 10 (e) of the **Administrative Procedure Act**, 5 U. S. C. 1009 (e), by positive direction requires the reviewing court, where the question is presented, to make a determination as to whether or not agency action, findings and conclusions are supported by substantial evidence, and it directs: "In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party." The Board in arguing that no different standard of judicial review is imposed by that statute, has completely disregarded the intention of Congress.

This language of Section 10 (e) of the **Administrative Procedure Act** first appeared in the draft bill annexed to the minority report of the Attorney General's Committee on Administrative Procedure, in which report by way of explanation it was said:*

> "The present scope of judicial review is also subject to question in view of one of the prevalent interpretations of the 'substantial evidence' rule set forth as a measure of judicial review in many important statutes. Under this interpretation, if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate . . . Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is

*Sen. Doc. No. 8, 77th Cong. 1st Sess., pp. 210-211.

to be sustained and the record to the contrary is to be ignored. The courts, of course, should not weigh meticulously every bit of evidence. Indeed, such a requirement would prove a very undesirable burden. But the courts should set aside decisions clearly contrary to the manifest weight of the evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error."

In an analysis of Section 10 (e) of the **Administrative Procedure Act** by Mr. John Dickinson at an institute conducted by the New York University School of Law on February 1-8, 1947,** it is said:

"In the light of this analysis of the three sentences constituting paragraph (e) which defines the scope of review, it may now be inquired whether the provisions of that paragraph, which are henceforth to be applied in all administrative review proceedings in the Federal courts, make any change in the rules hitherto applied by those courts, first, with respect to review of questions of law, and second, with respect to review of questions of fact. I believe that the conclusion which must be reached after such an inquiry is that properly construed the new statute does make a change in both particulars, and broadens in both instances the scope and measure of the review which the Federal courts are henceforth required to make of administrative action in cases where such action is reviewable at all."

Mr. Dickinson's specific explanation of his reasoning with respect to questions of fact is as follows:

"In the same way that the language of paragraph (e) seems clearly intended to broaden to the extent just indicated the scope of judicial review on ques-

**Federal Administrative Procedure Act And The Administrative Agencies, New York University School of Law Institute—Proceedings, Volume VII, pages 581-589.

tions of law, there is likewise shown by other language of the paragraph a clear intent to broaden similarly the scope of review on questions of fact. It is submitted that no other conclusion can properly follow from the third, or last, sentence of paragraph (e) when read in the light of the legislative history of the act and of the earlier bills which preceded it.

"The relevant language is that the reviewing court, in making its determinations in the enumerated situations where it is under a duty to set aside an administrative finding, 'shall review the whole record or such portions thereof as may be cited by any party.' This language is to be read especially in connection with that part of the previous sentence which lays upon the court the duty of setting aside 'agency action, findings and conclusions . . . unsupported by substantial evidence.' These two parts of the statute when read together sum up into substantially the same result as that contained in the bill of the Acheson Committee minority which required the reviewing court to consider 'findings, inferences or conclusions of fact unsupported, upon the whole record, by substantial evidence'."

After discussing the legislative history and particularly the reports of the Senate and House Committees,† Mr. Dickinson continued as follows:

"Aside from these and similar unmistakable expressions of legislative intent, it seems entirely clear that language which differs as widely as that contained in the last sentence of paragraph (e) from the hitherto accepted formulae for fact review would not have been used, and that there would have been no reason or excuse for using it in the statute, if it was the intention of Congress by this paragraph to make

†Identical language occurs in both reports, as follows: "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2nd Sess., entitled **"Administrative Procedure Act, Legislative History,"** pp. 214, 280.

no change in existing law but merely to restate it. The existing formulae confine themselves to the requirement either that the finding of the administrative agency shall not be 'unsupported by evidence' or 'shall be supported by substantial evidence.' The Administrative Procedure Act goes further. It does not content itself with a mere restatement of the 'substantial evidence' rule; it adds a novel requirement when it says that the reviewing court in determining whether or not a finding is supported by substantial evidence 'shall review the whole record or such portions thereof as may be cited by any party.' This new and additional language must be given some meaning. What that meaning is should appear without further comment from the history of the various transformations of the review parts of the earlier bills discussed in the first section of this paper.

"In final summary and conclusion, it may be said that if the review provisions of the Administrative Procedure Act are to be construed by the courts in an objective spirit and in such manner as to give effect to their intent and purpose, they should at least produce two results. First, they should make impossible a judicial refusal, as in Dobbson v. Commissioner, to consider independently so-called 'technical' questions of law, and secondly, they should make impossible a judicial failure, as was apparently the case in National Labor Relations Board v. Waterman Steamship Co. and in National Labor Relations Board v. Bradford Dyeing Ass'n, to consider whether opposing evidence destroyed the apparently 'substantial' character of evidence tending to support the administrative determination of fact."

In the Brief in Opposition in this case, the Board seems to argue not so much that there has been no change in the statutory law but, strangely enough in view of the Board's position up to this time, the Board here claims that the courts have always applied the standard which is now required by the **Administrative Procedure Act.** No more

convincing evidence to the contrary need be cited than the opinion in this case where the court below failed to make any determination on the contention that the findings of the Board are not supported by substantial evidence. But the Board states that the court below in other cases has applied the standard of review which is now made explicit by the **Administrative Procedure Act.** It is difficult to understand the Board's reasoning that this act imposed no different standard of judicial review on the assumption that the Board has been able to find three cases in which the Board claims that the court applied the standard which is now required by the Act. But wholly apart from the Board's defective reasoning, the cases cited by the Board do not support the Board's contention and do not apply the standard of judicial review required by the Act.

In **National Labor Relations Board v. Laister-Kauffmann Aircraft Corp.**, 8 Cir., 144 Fed. 2d 9, 16, the court said that the Board may not **with "studied design"** ignore all the evidence adduced by the employer, because to do so would be to act arbitrarily, and the court continued:

> "The Board's decision shows that a careful study of the facts and circumstances and all the testimony was made by the Board, and presents a thoughtful consideration of the credibility of the testimony in question. The Board's conclusion, based on such careful consideration of the character and nature of the testimony and the prejudices, desires and motives of the witnesses, completely refutes any suggestion that the Board acted **with 'studied design'** hostile to respondent in passing on the credibility of the witnesses." (Emphasis supplied.)

All that the court held in that case was that the Board should not "with studied design" ignore the testimony offered by one party. Surely not even the Board intends seriously to contend that this is the limit of the standard

of judicial review required by the **Administrative Procedure Act.**

The case of **National Labor Relations Board v. Winona Textile Mills,** 8 Cir., 160 F. 2d 201, 203, stated the standard of judicial review which the court considered that it was required to apply as follows:

> "In our consideration of the case we are governed by the rule succinctly stated by the Supreme Court in Medo Photo Supply Corporation v. National Labor Relations Board, 321 U. S. 678, 681, 682, 64 S. Ct. 830, 832, 88 L. Ed. 1007, in these words:
>
> "'It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judgment of the Board is entitled to great weight . . .'"

Can that be the Board's concept of the standard of judicial review now required by the **Administrative Procedure Act?** It is difficult to believe that the Board wishes to be so understood.

In the case of **Cupples Co. Mfrs. v. National Labor Relations Board,** 8 Cir., 106 F. 2d 100, 105, decided in 1939, the court observed that evidence which merely furnishes grounds for suspicion and conjecture proves nothing and that the Board may not disregard uncontradicted testimony of unimpeached and credible witnesses not shaken on cross-examination and not contradicted by any witness, fact or circumstance. This case has no relevancy to the question involved here.

We submit that a different standard of judicial review has been imposed by the **Administrative Procedure Act** of 1946, and that similar provisions contained in the **Labor-Management Relations Act, 1947**, add to the general importance of the question presented.

II.

The Court Below Failed to Apply the Standard of Judicial Review Required by the Administrative Procedure Act, and Failed to Make a Determination From the Whole Record as Required by That Act on the Contention That the Findings of the Board Are Not Supported by Substantial Evidence.

The Board's argument that no different standard of judicial review has been imposed by the **Administrative Procedure Act** is, at least inferentially, a concession that, if a different standard has been imposed by the Act, it was not applied by the court below in this case. As the Board recognizes, the sole question presented to the court below was whether or not the testimony of the witness Lee constitutes substantial evidence to support the Board's order. The court in its opinion stated that was the sole question (R. 8). Nevertheless, the only answer to that question which can be found in the court's opinion is as follows:

> "The findings of the Board upon issues of fact are conclusive on review, no matter how convincing may be the argument that upon the evidence the findings should have been different" (R. 11).

The Brief in Opposition points out that the opinion below contains a brief summary of the testimony, and from that the Board reasons that the court below must have examined the record. We have no doubt that the court did examine the record, but the opinion contains

no statement or indication that the court below determined that the Board's findings are supported by substantial evidence, or that the court below did more than look in the record to see if some portion of Lee's testimony supported the Board's findings without considering Lee's self-impeachment and inconsistencies. It was the duty of the court under the **Administrative Procedure Act** to make a determination from the whole record as to whether or not the findings of the Board are supported by substantial evidence since that question was presented as the sole issue in the case, and the opinion of the court below fails to indicate that any such determination was made, but on the contrary the opinion shows that the court below considered the Board's findings to be conclusive "no matter how convincing may be the argument that upon the evidence the findings should have been different." It is not enough under the **Administrative Procedure Act** for the reviewing court merely to find that a witness testified to facts which if believed by the Board would support the findings. Under the Act it is the duty of the reviewing court to consider the record as a whole and make a determination as to whether or not the findings are supported by substantial evidence. Such determination as to whether or not there is substantial evidence may not ignore the fact that the testimony upon which the Board relies exclusively for support of its findings is the testimony of an interested witness which is so self-impeached, so improbable upon its face, and so inconsistent that a reasonable mind could not accept it as adequate to support a conclusion and which therefore does not constitute substantial evidence. That was the question presented to the court below, and the court failed to make any determination from the record as a whole but instead held that the findings of the Board are conclusive on review "no matter how convincing may be the argument that upon the evidence

the findings should have been different." That language indicates strongly the court's reluctance in accepting the Board's findings as conclusive and clearly implies, at least, that the court felt that based on the whole record the result should have been different.

III.

The Decision of the Court Below Is in Conflict With the Decisions of Other Circuit Courts of Appeals.

The Petition in this case (pp. 8, 23, 24) points out the conflict between the opinion below and the decisions in the cases of **National Labor Relations Board v. Sun Shipbuilding and Dry Dock Co.**, 3 Cir., 135 F. 2d 15, 25; **Loveman, Joseph and Loeb v. National Labor Relations Board**, 5 Cir., 146 F. 2d 769, 772; **National Labor Relations Board v. Brown Brockmeyer Co.**, 6 Cir., 143 F. 2d 537, 542, and **National Labor Relations Board v. Reeves Rubber Co.**, 9 Cir., 153 F. 2d 340, 342. The Brief in Opposition attempts to brush this conflict aside merely by saying that there is no conflict (Br. p. 13). The conflict is clearly shown by a comparison of the opinion in this case with the cited opinions of other circuit courts of appeals, and the Board's failure to make any effort to explain or reconcile the conflict amounts to a tacit admission that it is unable to do so.

IV.

The Board's Findings Rest Exclusively on Lee's Uncorroborated Testimony.

The Brief in Opposition is filled with inaccurate statements and record references which do not support the statements for which they are cited. We deem it unnecessary at this time to discuss these erroneous factual statements in the Board's brief, except that we should dis-

prove the Board's statement, "Nor does the Board's decision in the instant case rest as exclusively on Lee's uncorroborated testimony as petitioner states" (Br. 13). In an effort to support this statement the Board in its brief claims that it found corroboration "in McCarthy's own account of his one-sided and belated investigation into the grounds he assigned for Lee's discharge (R1: 76-78)." The record reference is to the Intermediate Report of the trial examiner and refers to an additional investigation made by McCarthy after the discharge in response to the Union's request that Lee be reinstated. The trial examiner found that this investigation was an unfair labor practice, but the Board in its decision overruled its trial examiner in this respect (R1: 48, 49). Next the Board states that it found corroboration in the fact that Mrs. Winfield and Mrs. Davis did not complain to McCarthy of Lee's insubordination until McCarthy consulted them with respect to his tentative conclusion that Lee should be suspended temporarily because of her violation of a store rule (Br. 13). But, as the Board itself points out in its brief, Lee testified that Winfield "told Lee that the latter owed her continued employment to Mrs. Winfield, that Mrs. Winfield 'knew enough' to have her discharged, but that the Company could not 'pay' her enough to 'sell out' her own people" (Br. 5). The fact that Winfield and Davis chose to protect a member of their race lends no corroboration to Lee's testimony in this case. Obviously the facts which, according to Lee's testimony, Winfield claimed to be withholding from management must have related to Lee's work and could not have referred to Lee's union activities, because her union activities were known to everyone, including management, for approximately two years prior to that time (R2: 33, 41, 42, 147, 148, 153).

Next the Board says that its findings were corroborated by two earlier cases (Br. 13, 14). As pointed out in the

Petition (pp. 20, 21), both earlier cases involved a CIO union, and in one of them it was held that Petitioner had discriminated against the CIO in **favor of the AFL.** Certainly the decisions in those cases could not corroborate Lee's testimony claimed by the Board to show discrimination **against the AFL.** In fact, they tend to show the contrary.

The foregoing are the only claims made by the Board that there was any corroboration for Lee's testimony in this case. Such claims, even if they were not erroneous, would make a very inadequate showing of corroboration in view of the fact that seven of Lee's co-workers were called by the Board as witnesses in this case and not a single one of them testified to any fact which corroborated Lee's testimony upon which the Board relies, and not a single one of them had ever heard Winfield make any anti-union statement at any time (R2: 88-111). The Board's effort by general statements, wholly unsupported by the record, to lend some substance to the portion of Lee's testimony upon which the Board relies fails completely to answer the specific showing contained in the Petition (pp. 25-46) that Lee's uncorroborated testimony is so self-impeached, so improbable on its face and so inconsistent that a reasonable mind could not accept it as adequate to support a conclusion and, therefore, it does not constitute substantial evidence.

CONCLUSION.

The **Administrative Procedure Act** does impose upon reviewing courts a new and broader standard of judicial review, and the general importance of this question is enhanced by the fact that similar provisions are contained in the **Labor Management Relations Act, 1947.** The Court below failed to apply the standard of review imposed by

the **Administrative Procedure Act**, and failed to make any determination from the record as a whole on the contention that the findings of the Board are not supported by substantial evidence. The decision of the court below is in conflict with controlling decisions of this Court, and is in conflict with the decisions of other circuit courts of appeals.

It is respectfully submitted that this case should be reviewed by this Court because of the general importance of the questions presented.

Respectfully submitted,

MILTON H. TUCKER,
ROBERT T. BURCH,
Attorneys for Petitioner.